

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOPHEARY SANH,
Plaintiff,

v.
OPPORTUNITY FINANCIAL, LLC, *et al.*,
Defendants.

NO. C20-0310RSL

ORDER GRANTING RISE CREDIT
SERVICE OF TEXAS' MOTION TO
DISMISS

This matter comes before the Court on defendant RISE Credit Service of Texas, LLC's

“Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6).” Dkt. # 31. Plaintiff alleges, on behalf of herself and all others similarly situated, that RISE solicits vulnerable consumers within the State of Washington for loan products but does not disclose in their solicitations that the loans have outrageous interest rates far in excess of that which is permitted under Washington’s usury statute. Plaintiff alleges that she received solicitations from defendants, three non-bank entities, in March and April 2019 notifying her that she was pre-approved for a loan with an interest rate that would decrease over time and which was a “better way to borrow.” Dkt. # 1-1 at ¶¶ 13 and 16. As a result of RISE’s communications, plaintiff entered into a \$3,000 loan agreement with FinWise Bank, for which RISE was compensated by FinWise. Dkt. # 1-1 at ¶¶ 31, 32, and 34. Plaintiff asserts state law claims under the Washington

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1 Consumer Protection Act (“CPA”) and for unjust enrichment. RISE seeks dismissal of all of
2 plaintiff’s claims on the grounds that RISE is not subject to the jurisdiction of this Court and that
3 the claims are preempted and/or do not state a claim for which relief can be granted.
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5 In the context of a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ.
6 P. 12(b)(2), plaintiff has the burden of demonstrating that the Court may exercise personal
7 jurisdiction over RISE. *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716,
8 741 (9th Cir. 2013). In evaluating RISE’s jurisdictional contacts, the Court accepts
9 uncontested allegations in the complaint as true. *Menken v. Emm*, 503 F.3d 1050, 1056 (9th
10 Cir. 2007). Because the motion is based on written materials rather than an evidentiary hearing,
11 the Court evaluates the uncontested allegations and the evidence submitted to determine
12 whether plaintiff has made a *prima facie* showing of jurisdictional facts. *Schwarzenegger v. Fred
13 Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Conflicts in the evidence provided by the
14 parties must be resolved in plaintiff’s favor. *Id.*

15 In the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court’s review is
16 generally limited to the contents of the complaint. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479
17 (9th Cir. 1996). The question for the Court is whether the facts alleged in the complaint
18 sufficiently state a “plausible” ground for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
19 (2007).

20 A claim is facially plausible when the plaintiff pleads factual content that allows
21 the court to draw the reasonable inference that the defendant is liable for the
22 misconduct alleged. Plausibility requires pleading facts, as opposed to conclusory
23 allegations or the formulaic recitation of elements of a cause of action, and must
24 rise above the mere conceivability or possibility of unlawful conduct that entitles
25 the pleader to relief. Factual allegations must be enough to raise a right to relief
26 above the speculative level. Where a complaint pleads facts that are merely
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1 consistent with a defendant's liability, it stops short of the line between possibility
 2 and plausibility of entitlement to relief. Nor is it enough that the complaint is
 3 factually neutral; rather, it must be factually suggestive.

4 *Somers v. Apple, Inc.*, 729 F.3d 953, 959-60 (9th Cir. 2013) (internal quotation marks and
 5 citations omitted). All well-pleaded factual allegations are presumed to be true, with all
 6 reasonable inferences drawn in favor of the non-moving party. *In re Fitness Holdings Int'l, Inc.*,
 7 714 F.3d 1141, 1144-45 (9th Cir. 2013). If the complaint fails to state a cognizable legal theory
 8 or fails to provide sufficient facts to support a claim, dismissal is appropriate. *Shroyer v. New*
 9 *Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).

10 Having considered the Complaint and the memoranda, declarations, and exhibits
 11 submitted by the parties, and having heard the arguments of counsel, the Court finds as follows:

12 **A. Personal Jurisdiction**

13 Plaintiff alleges that defendant RISE sent solicitations to her home in Washington inviting
 14 her to request "pre-approved" loans, that she responded to the solicitations, and that she was
 15 injured as a result. RISE has not provided evidence that contradicts these allegations. The only
 16 evidence submitted with the motion is a one-page data sheet regarding FinWise Bank (Dkt. # 31-
 17 1) and a "Joint Marketing Agreement" between FinWise and EF Marketing, LLC (Dkt. # 31-2).
 18 The fact that FinWise is a bank headquartered in Utah that contracted with EF Marketing to
 19 coordinate its nationwide marketing efforts is not inconsistent with plaintiff's allegations, and
 20 RISE has not offered a declaration or other evidence tending to show that the named defendant
 21 did not solicit Washington residents. The allegations of the complaint are therefore
 22 uncontested and accepted as true.

1 **B. Federal Preemption**

2 Plaintiff asserts two claims under the CPA and a separate claim for unjust enrichment.
3 Plaintiff's first CPA claim is based on allegations that RISE engaged in unfair and deceptive
4 practices when it targeted vulnerable Washington consumers with solicitations for pre-approved
5 loans that failed to disclose the outrageous and usurious costs associated with the loans. Plaintiff
6 also asserts a *per se* CPA claim arising out of RISE's alleged violation of Washington's usury
7 statute, RCW 19.52.020. Plaintiff's unjust enrichment claim is based on supposed benefits RISE
8 received when it was able to convince Washington consumers, like plaintiff, to enter into a loan
9 agreement. RISE argues that all three claims are preempted by the Depository Institutions
10 Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d, which allows
11 federally-insured, state-chartered banks like FinWise to export the interest rate allowed by their
12 home state to the national market. DIDA expressly preempts "any State constitution or statute"
13 which would require a lower interest rate, such as Washington's usury law. 12 U.S.C.
14 § 1831d(a).

15 Plaintiff's *per se* CPA claim undoubtedly relies on the preempted state usury law.
16 Plaintiff argues, however, that RISE is not a bank entity and therefore not entitled to claim
17 DIDA preemption. The preemptive effect of 12 U.S.C. § 1831d, like its precursor in the National
18 Bank Act of 1864 ("NBA"), extends not only to the bank that issues the loan or extends the line
19 of credit, but also to the affiliates, assignees, servicers, and secondary markets that carry the
20 obligation to term on behalf of or in place of the original lender. *See Krispin v. May Dep't Stores*
21 Co., 218 F.3d 919, 924 (8th Cir. 2000) (NBA preemption applies if the originating entity is a
22 bank, even if subsequent assignees are non-bank entities); *FDIC v. Lattimore Land Corp.*, 656
23 F.2d 139, 147-49 (5th Cir. 1981) (when determining whether the NBA governs a loan assigned
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1 by an originating bank to an entity in another state, “[t]he non-usurious character of a note
 2 should not change when the note changes hands”); *Barnett v. T.D. Escrow Servs., Inc.*, 2005 WL
 3 1838623, at *1 (W.D. Wash. Aug. 1, 2005) (finding that usury claims against loan servicing
 4 agents are preempted by DIDA). *See also* Dkt. # 41 at 3-4 (FDIC Final Rule re: Federal Interest
 5 Rate Authority, dated June 5, 2020, clarifying that banks can transfer enforceable rights in loans
 6 they make under the preemptive authority of the NBA and noting that DIDA is patterned after
 7 and interpreted in the same way as the NBA). Thus, Washington’s usury statute, which does not
 8 apply to a high interest rate loan made by a federally-insured, state-chartered bank like FinWise,
 9 does not spring back into force if the loan is serviced by or conveyed to a non-bank entity like
 10 RISE.

12 Plaintiff argues, however, that FinWise was not the true lender in the circumstances
 13 presented here and that RISE is the real-party-in-interest. In this narrative, RISE simply co-opted
 14 or rented FinWise’s name so that it could affix it to the loan documents, acquire DIDA
 15 preemption, and evade Washington’s efforts to regulate the interest rates charged its citizens.
 16 Where a non-bank entity has extended a loan, there is no state-chartered bank, there is no issue
 17 of federal insurance, and state regulation of such loans would not adversely impact a banking
 18 entity’s ability to lend: DIDA preemption would therefore not apply. 12 U.S.C. § 1831d(a)
 19 (preventing discrimination against state-chartered insured depository institutions); *Ubaldi v.*
 20 *SLM Corp.*, 852 F. Supp.2d 1190, 1203 (N.D. Cal. 2012) (declining to dismiss usury claim
 21 where plaintiff alleged that the national bank named in the loan documents was not the actual
 22 lender). *See also* Dkt. # 41 at 5 (FDIC Final Rule re: Federal Interest Rate Authority, dated June
 23 5, 2020, recognizing the “real party in interest” argument and noting that “the FDIC continues to
 24 support the position that it will view unfavorably entities that partner with a State bank with the
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1 sole goal of evading a lower interest rate established under the law of the entity's licensing
 2 State(s)"). The problem is not with plaintiff's "true lender" or "real party in interest" theory of
 3 liability, but with the allegations of the complaint. At no point does plaintiff allege, even in a
 4 conclusory fashion, that RISE was the lender in her loan transactions. To the contrary, plaintiff
 5 alleges that RISE's role was to generate leads for loans from FinWise, that she entered into a
 6 series of loan agreements with FinWise, and that RISE made money on the transaction by
 7 receiving compensation from FinWise on a per loan basis (not through receipt of interest
 8 payments). Dkt. # 1-1 at 1 and ¶¶ 30-31, 34, and 73-74. Given the allegations of the complaint,
 9 plaintiff's *per se* CPA claim is preempted under DIDA.

11 **C. Plausible Claim for Relief**

12 The Court assumes for purposes of this motion that some portion of plaintiff's non-*per se*
 13 CPA and unjust enrichment claims are based on conduct other than the interest rate charged in
 14 the loan agreements. To that extent, these claims would not be preempted.¹ They nevertheless
 15 fail because the allegations of the complaint do not give rise to a plausible inference that RISE
 16 could be held liable on either claim.

17 1. Non-*Per Se* CPA Claim

18 a. Injury to Business or Property

19 Plaintiff's allegations of injury for purposes of her CPA claim are that: (a) RISE solicited
 20 loan products with "outrageous interest rates; (b) "[o]ver the course of 48 payments, the loan of
 21 \$3,000 will cost her \$9,666.08;" and (c) "plaintiff and the members of the class she seeks to

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 26 ¹ If, for example, RISE's solicitations included misrepresentations regarding the fees associated
 27 with the proposed transaction or a false promise of a free car upon signing, a CPA claim having nothing
 to do with the interest rate charged might survive the preemptive effect of DIDA.

represent have suffered injury and damages in an amount to be proven at the time of trial.” Dkt. # 1-1 at ¶¶ 19, 33 and 57. Although the third allegation is conclusory and formulaic, the first and second, taken together, raise a plausible inference of financial injury arising out of RISE’s solicitation.²

b. Causation

Defendant argues that plaintiff has not adequately alleged that her payment of excessive interest is causally connected to its allegedly unfair and deceptive solicitations. RISE’s theory is that plaintiff was injured as a result of her loan agreement with FinWise, absolving RISE of any liability associated with its efforts to solicit that agreement. RISE’s demand for a direct causal connection, with no intervening acts or events, is unsupported by Washington law. The Court finds that the issuance of the loan RISE successfully solicited is not a superceding cause of plaintiff’s alleged injury.

c. Unfair and Deceptive Act or Practice

For the reasons stated in the Court’s “Order Granting Opportunity Financial’s Motion to Dismiss,” of even date, plaintiff has failed to identify what representations RISE made or how they were misleading. In the absence of additional information regarding the form, content, and context of RISE’s solicitations, plaintiff has failed to raise a plausible inference of liability under the CPA.

2. Unjust Enrichment

Plaintiff argues that RISE was unjustly enriched by the amount of the payments it

² RISE vaguely suggests that plaintiff has been excused from making payments under the loan agreement, such that she will be unable to show injury arising out of the loan. While RISE may be able to show that plaintiff has not, in fact, suffered cognizable injury under the CPA, resolving that factual issue is not appropriate in the context of this motion to dismiss.

1 received from FinWise in exchange for its services in locating borrowers and instigating the
2 loans. The first element of an unjust enrichment claim requires that the benefit be conferred upon
3 the defendant by the plaintiff or at the plaintiff's expense. *Young v. Young*, 164 Wn.2d 477, 484
4 (2008). Plaintiff does not allege that she paid any fees to RISE or that the compensation paid by
5 FinWise was at plaintiff's expense. Absent such allegations, the unjust enrichment claim is not
6 plausible.

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9 For all of the foregoing reasons, defendant RISE's motion to dismiss is GRANTED.
10 Plaintiff's *per se* CPA claim is preempted by DIDA, and the allegations of the complaint do not
11 give rise to a plausible inference of liability under a non-*per se* CPA or unjust enrichment
12 theories. All claims against RISE are therefore DISMISSED. If plaintiff believes she can,
13 consistent with her Rule 11 obligations, amend the complaint to remedy the pleading and/or
14 legal deficiencies identified above, she may, on or before January 25, 2021, file a motion to
15 amend and attach a proposed pleading for the Court's consideration pursuant to LCR 15.
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18 Dated this 12th day of January, 2021.

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20 Robert S. Lasnik
21 United States District Judge
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